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No. 05-1508

IN THE

Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89, *et al.*,
Petitioners,

v.

DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the United States Secretary of Education's certification of New Mexico as a State that "equalizes expenditures" was based on a permissible interpretation of the statutory Impact Aid disparity standard, 20 U.S.C. § 7709(b).

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BRIEF FOR RESPONDENT

INTRODUCTION

This proceeding constitutes an attempt by two school districts in the State of New Mexico – Zuni Public School District No. 89 ("Zuni") and Gallup-McKinley County School District No. 1 ("Gallup") (collectively, "petitioners") – to overturn the State's long standing and carefully designed school-finance system. That system distributes state revenue dollars to local school districts in a manner that equalizes school operational funding throughout the state.

The petitioner school districts are local educational agencies ("LEAs") within the meaning of federal law that receive special funding from the federal government through the Impact Aid program. 20 U.S.C. § 7701 *et seq.* Impact Aid is

federal funding that compensates eligible school districts when their ability to raise local property tax revenue is reduced due to the presence of federal government operations on land within the school district.[1]

In general, states are prohibited from considering their school districts' Impact Aid receipts when determining the amount of *state* aid allocations to school districts. 20 U.S.C. 7709(a). However, federal law creates a single exception to this general prohibition: If the United States Secretary of Education (the "Secretary") certifies that the state has a state aid program that equalizes expenditures among its LEAs, that state is permitted to consider the Impact Aid funds that its LEAs receive when determining how to allocate state aid among LEAs. 20 U.S.C. § 7709(b)(1). In essence, a certified equalized state is authorized to adjust the amount of *state* aid to districts receiving Impact Aid, in accordance with a federally-mandated formula, to account for the receipt of a portion of the federal Impact Aid.[2]

The Impact Aid statute and the implementing regulations provide a detailed methodology for the Secretary to use in determining whether a state meets the criteria for the equalization exception. In this case, petitioners challenge the long-standing methodology – a methodology that originated in a federal regulation, that was subsequently enacted as a federal statute whose language was proposed by the Executive Branch, and that was subsequently incorporated by Congress into a related statutory program. As demonstrated herein, the Secretary correctly certified New Mexico as

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[1] The terms "LEA" and "school district" will be used interchangeably throughout this brief.

[2] Contrary to petitioners' claims (Pet. Br. at 46), a certified state's consideration of Impact Aid payments does not affect an LEA's benefit of receiving Impact Aid funds. The amount of federal Impact Aid that LEAs receive is *never* affected by this state decision making process, which only determines state aid allocations to its LEAs.

equalized. Accordingly, New Mexico properly considered the Impact Aid received by certain of its LEAs, including petitioners, in allocating state aid among all of its school districts.[3]

New Mexico distributes state resources for education in a manner that equalizes total revenues available to each student throughout the state at the highest level possible. If New Mexico were to allocate its state funding without taking into account the Impact Aid that LEAs such as petitioners receive, New Mexico would not be equalizing its funding. Rather, Impact Aid would exacerbate funding inequality because the LEAs receiving Impact Aid would receive what is essentially a double payment. In addition to receiving Impact Aid to help compensate for their particular difficulty in raising local revenue, these LEAs would receive the full amount of aid from the State under a state program designed to equalize available revenues per-pupil. Thus, these Impact Aid LEAs would receive one payment from the federal government and one from the State government, both with the effect of compensating them for the same lost revenues due to the impact of a federal presence. Meanwhile, LEAs that do not qualify for Impact Aid but face equal challenges in raising revenue would receive only one payment from the State.[4]

Accordingly, if New Mexico is not permitted to take Impact Aid into account, LEAs receiving Impact Aid will receive a substantial windfall at the expense of non Impact Aid districts. This will significantly undermine New Mexico's

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[3] The year at issue in this case is Fiscal Year ("FY") 2000. Petitioners, however, are in the process of administratively challenging the Secretary's certification of the State for every FY since then as well. These cases have been stayed pending the outcome of this case.

[4] Moreover, under the state distribution formula and a set amount of available funding, the state payment to LEAs not receiving Impact Aid would necessarily be decreased from current levels as a necessary result of increasing state payments to Impact Aid LEAs.

attempts to equalize its school district funding and, indeed, create a significant disincentive for equalization. This is precisely the *opposite* of the result Congress intended: Congress created an exception allowing equalized states to consider Impact Aid in making their state aid determinations in order to "prevent impact aid from hindering states' equalization efforts and [to prevent] duplicative compensation of school districts affected by federal activity (once by the federal government through impact aid and a second time by the state's equalization program)." U.S. Gen. Accounting Office, *School Finance: State Efforts To Equalize Funding Between Wealthy and Poor Districts, GAO/HEHS 98-92*, 16 (June 6, 1998).

Understandably, petitioners would prefer that the Impact Aid they receive not be considered when the State performs its equalization among school districts. In that scenario, a greater share of State funds would flow to petitioners, and thus a higher total revenue per student for students attending petitioners' schools would result from the combination of Impact Aid and state aid. This is a zero-sum game, however; and a necessary consequence of this scenario is that a lower share of State funds would flow to those LEAs not receiving Impact Aid. New Mexico's goal, however, is to equalize the revenues available to *each* student throughout the State (*i.e.*, to equalize all per-pupil revenues in the state) regardless of which LEAs they attend.

Petitioners' attack on New Mexico's equalization system is based on their erroneous claims (1) that the Secretary misread the statute in promulgating the interpretive regulations employed in the equalization certification process and (2) that under the singular, correct reading of the statute, the State would not qualify for certification and would not be permitted to take Impact Aid into account in making its allocations to LEAs throughout the State. As we now show, however, the statute at issue is ambiguous; the Secretary's reading is emi-

nently reasonable; and the Secretary's determination that New Mexico is equalizing school funding among school districts should be affirmed. Indeed, the Secretary's regulations reflect the only reading that harmonizes the text of the statute with its context and purpose and that is consistent with the evolution of the Impact Aid program and the origin of the statutory language in a bill proposed by the Department of Education itself.

STATEMENT OF THE CASE

A. Historical Background.

The modern movement towards school finance equalization at the state level finds its origins in the decision of this Court in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973). In *Rodriguez*, the parents of students attending low-wealth and majority-minority school districts in San Antonio, Texas sued the City, arguing that wealthy districts unjustly benefited due to the use of property taxes to fund the schools and that this inequity in school funding violated the parents' and students' constitutional rights to equal protection of the laws. *Id.* at 4-5. The Supreme Court disagreed with the plaintiffs and held that, because education is not a fundamental right and wealth is not a suspect class requiring heightened scrutiny, no federal constitutional violation resulted from these widespread, substantial funding disparities. *Id.* at 18.

Despite its denial of relief, this Court also observed that the education finance system "may well have relied too long and too heavily on the local property tax," and emphasized that its decision should not be viewed as placing a "judicial imprimatur" on the school finance system. *Id.* at 58. The Court encouraged state legislators, *inter alia*, to seek solutions to this problem. *Id.* at 59. This decision caused school finance reform advocates to look principally to state legislatures and

state courts to redress the substantial fiscal inequality in the states' school finance systems.

Accordingly, although the *Rodriguez* litigation was unsuccessful in the federal constitutional arena, numerous challenges to school funding disparities were brought under state constitutions. These challenges, in turn, spurred legislative interest in school equity finance at the state level. Relevant here, in the early 1970s, in New Mexico, a group of plaintiffs filed a lawsuit challenging the constitutionality of the State's education finance system on the ground the expenditures varied substantially based on the wealth of the school district. This case was settled before trial when New Mexico decided to fund virtually all the operational costs of its school districts at the state level and to provide essentially equal resources to each district.

New Mexico's 1974 Public School Finance Act resulted in state funding of over 80% of local education costs, "second only to Hawaii in this regard, and the system has continued to produce more equitable funding than systems in most states." *See* http://www.schoolfunding.info/states/nm/lit_nm.php3 (last visited Dec. 13, 2006).[5] As New Mexico's Legislative Education Study Committee ("LESC") explained: "Two objectives were essential to the development of the K-12 formula 1) to equalize educational opportunity statewide (by crediting certain local and federal support and then distributing state support in an objective manner) and 2) to retain local autonomy in the actual use of funds." Roberta L. Derlin, New Mexico School Finance: An Historical Perspective 4 (March 23, 1996) (unpublished paper presented at the American Education Finance Association Annual Meeting), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/23/99/4c.pdf (last visited

[5] Numerous states have been required to address this issue following litigation in state courts.

Dec. 13, 2006) (quoting *State of New Mexico LESC Report to the Legislature*, at 1 (1995)). As one scholar summarized: "The New Mexico K-12 funding formula developed in 1974 to meet these objectives was considered the 'most far-reaching equalization concept in current law in the United States." *Id.* (quoting *State of New Mexico LSSC Report to the Legislature*, at 5 (1975)).

After *Rodriguez*, the Federal Government, too, decided that while school finance equalization was not a federal constitutional imperative, federal policy should support state efforts to equalize. In 1974, Congress amended the statute authorizing the Impact Aid program to include the equalization exception described above. This exception encourages equalization by allowing equalized states to consider the Impact Aid received by a school district when it allocates state aid among its school districts. *See* Education Amendments of 1974, Pub. L. No. 93-380, § 305(a)(1), 88 Stat. 484 (1974). In that same legislation, Congress enacted a separate federal grant program to assist states in planning for equalization in their programs of state aid for public education.[6] The purpose was to help states implement programs of state aid that "achieve[d] equality of educational opportunity for all children in attendance at the schools of the local educational agencies of the state." *See* Pub. L. No. 93-380, § 842, 88 Stat. 484 (1974).

This established federal policy encouraging state equalization efforts continued into the 1990s. The Improving America's Schools Act of 1994 ("IASA"), which reauthorized the Elementary and Secondary Education Act of 1965, main-

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[6] Four years later, Congress replaced that program with an equalization assistance program. Similar to its predecessor, this successor grant program provided states with federal financial assistance "to revise their systems of financing . . . in order to achieve a greater equalization of resources among school districts." Education Amendments of 1978, Pub. L. No. 95-561, § 1202, 92 Stat. 2143 (1978).

tained the equalization exception and established the Education Finance Incentive Program. Pub. L. No. 103-382, Title I § 1125a, 108 Stat. 3518, 3575-77 (1994). This program, which still operates today, awards additional federal money to states based on the degree of fiscal effort they make in school funding (*i.e.*, the level of state spending relative to the state's ability to pay), and based on the funding equity achieved. *See* 20 U.S.C. § 6337 (2006). Congress incorporated the regulation at issue here into the statute establishing this new program. Specifically, Congress directs the Secretary, when evaluating the funding equity achieved by a state, to consider whether that state meets the disparity test set forth in the regulatory scheme at issue here. 20 U.S.C. § 6337(b)(3)(B).

B. Statutory and Regulatory Framework.

As noted *supra*, the federal Impact Aid program (20 U.S.C. §§ 7701-7714) provides financial assistance to LEAs in areas where the federal government has adversely impacted an LEA's ability to provide educational services to school age children.[7] Such adverse impact generally occurs when the LEA's ability to raise local revenues is reduced due to the federal government's acquisition of real property (*e.g.*, government buildings, military bases, Indian reservations), or because the LEA provides educational services to a large number of children residing on, or whose parents are employed on, federal property. *See* 20 U.S.C. §§ 7701-7714 *et seq*. The amount of Impact Aid a school district receives is computed under a formula that is based on "the number of [federally-affected] children who were in average daily attendance in the schools of such [LEA]." 20 U.S.C. § 7703(a) & (b).

In general, the law prohibits a state educational agency ("SEA") from considering an LEA's receipt of federal Impact

[7] The Impact Aid program was originally passed by Congress and signed into law by President Truman in 1950.

Aid funds when determining the amount of financial assistance the State will provide to the LEA. 20 U.S.C. § 7709(a). There is, however, an exception to this general prohibition. An SEA is authorized by the Impact Aid statute to consider an LEA's receipt of federal Impact Aid funds if the Secretary certifies that the SEA has in effect a program of state aid that equalizes expenditures for free public education among all LEAs in the state. 20 U.S.C. § 7709(b).

This exception to the general prohibition on an SEA's ability to consider its LEAs' receipt of Impact Aid funds was first enacted in 1974.[8] In that legislation, Congress left all discretion with respect to defining "equalizing expenditures" to the Secretary of Education. *See* 20 U.S.C. § 240(d)(2)(b) (Supp. IV 1974) (Pet. App. at 70a). In 1976, after notice and comment rulemaking, the Secretary adopted regulations addressing the definition of equalization.[9] *See* 42 Fed. Reg. 15,544 (Mar. 22, 1977); 42 Fed. Reg. 18,279 (Apr. 6, 1977); 42 Fed. Reg. 65,524 (Dec. 31, 1977). In doing so, the Secretary granted states seeking to be certified as equalized the option of meeting any one of three different standards: the disparity standard, the wealth neutrality test, and consideration for exceptional circumstances.[10] 34 C.F.R. § 222.61(d) (1993).

Relevant here, under the disparity standard, the Secretary determined that a state would be equalized if the disparity in per-pupil expenditures among a state's LEAs was no greater than 25%. *See* 41 Fed. Reg. 26,320, 26,327 (June 25, 1976).

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[8] Not surprisingly, this provision was enacted on the heels of the *Rodriguez* decision and reflects Congress' general intent to encourage state equalization efforts.

[9] Proposed rulemaking occurred in 1975, 1976, and 1977. *See* 40 Fed. Reg. 19,114 (May 1, 1975); 41 Fed. Reg. 26,330 (June 25, 1976); 42 Fed. Reg. 15,540 (Mar. 22, 1977).

[10] These standards were found, respectively, at 34 C.F.R. § 222.63 (1993), 34 C.F.R. § 222.64 (1993), and 34 C.F.R. § 222.65 (1993).

The methodology to be used in determining the size of the disparity was set forth in Appendix A to this regulation. First, the Secretary ranked LEAs by per-pupil expenditures or revenues. Second, the Secretary identified those LEAs that were "at the 95th and 5th percentiles of the total number of pupils in attendance in the schools" of the state. 41 Fed. Reg. at 26,329 (Pet. App. at 159a-160a). Finally, the Secretary compared the per-pupil revenues of the two identified LEAs to determine whether the disparity exceeded 25%. *Id. See also id.* at 26,327. The effect of this calculation was to exclude from consideration the LEAs whose pupil populations provided 5% of the overall state pupil population at each end of the spending range for state LEAs.

The Secretary retained three regulatory options for states to use to qualify as equalized until 1994. In 1994, however, the Secretary decided to alter this regulatory scheme. At the request of the U.S. Department of Education, Congress eliminated the other equalization options and codified the disparity standard as the sole method for determining if a state is equalizing expenditures. The U.S. Department of Education drafted what would become the new language in the Impact Aid program. As part of the IASA, the Department's proposal entered both the House, via H.R. 3130, and the Senate, via S. 1513, with identical language.

The Department's requested language for IASA Section 8009(b)(2)(A) – appearing in both H.R. 3130 and S. 1513 – read as follows:

> (2)(A) For the purpose of paragraph (1), a program of State aid equalizes expenditures among local educational agencies if, in the second preceding fiscal year, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by or per-pupil revenues available to,

> the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent.

H.R. 3130, 103d Cong., 1st Sess. (1993) (as introduced on Sept. 23, 1993); S. 1513, 103d Cong., 1st Sess. (1993) (as introduced on Oct. 4, 1993). The Department's proposal itself also included the language that is at issue in this case, specifically a general parameter to implement the disparity determination and to account for anomalies in the data considered:

> In making a determination under this subsection, the Secretary shall –
>
> > disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile of such expenditures or revenues in the State.

H.R. 3130 (as introduced on Sept. 23, 1993); S. 1513 (as introduced on Oct. 4, 1993).[11]

Again, all of this language was drafted and proposed to Congress by the U.S. Department of Education. Sponsors of both bills included statements in their opening remarks recognizing that the language of these bills was requested by the Department. For example, the Hon. Dale E. Kildee, sponsor of H.R. 3130 referred to the bill as "the administration's proposal." 139 Cong. Rec. 2,237 (1993). On the Senate side, Senator Kennedy announced, "I am pleased to introduce on behalf of the administration . . ." and referred to the language as what "The administration is proposing" and "The administration's proposal calls for . . ." 139 Cong. Rec. 23,416 (1993). Senator Pell, a co-sponsor of S. 1513, added:

> [t]he Department of Education, under the exceptionally able leadership of Secretary Richard Riley, has devel-

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[11] Because New Mexico employs per-pupil revenue figures, "per-pupil expenditures or revenues" will be shortened to per-pupil revenues throughout the brief. New Mexico abbreviates these LEA funding levels as "revenue per MEM."

> oped a thoughtful, comprehensive initiative for reauthorization . . . a proposal that merits our careful consideration.

139 Cong. Rec. 23,512 (1993). Another co-sponsor, Senator Jeffords, also added remarks reflecting that S. 1513 was the administration's proposal, ("[we are] introducing – on behalf of the administration – the proposal for reauthorizing . . ."). 139 Cong. Rec. 23,514 (1993). Further, S. 1513 announces on its face that the sponsors introduced the bill "by request." S. 1513 at 1 (as introduced on Oct. 4, 1993). This expression is commonly used, and denotes that a given bill is the administration's proposed bill – the language that the administration requests from Congress.[12] Beyond acknowledging this proposal as coming from the Department, the legislative history nowhere discusses any other congressional intent with respect to the enactment of this language.

The resulting bill was passed and signed into law on October 24, 1994 as Public Law Number 103-82 with only minor changes to the Department's proposed language.[13] This is the

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[12] The expression "by request" is included in the House of Representatives rules manual and is discussed in several Congressional documents. *See Rules of the House of Representatives*, H.R. Doc. No. 241, 109th Cong., 1st Sess., rule XII §7(b)(5) at 606 (2005). For example, the 2003 House of Representatives document "How Our Laws Are Made," explains, "Occasionally, a Member may insert the words 'by request' after the Member's name to indicate that the introduction of the measure is at the suggestion of some other person or group—usually the President or a member of his Cabinet." H.R. Doc. No. 93, 108th Cong., 1st Sess., pt. 5, at 8-9 (2003). Similar explanations also appear in Senate documents. According to the Senate document *Enactment of a Law*, "Bills to carry out the recommendations of the President are usually introduced "by request" by the chairmen of the various committees or subcommittees thereof which have jurisdiction of the subject matter." United States Senate, *Enactment of a Law*, ch. 4, Origins of Legislation, *available at* http://www.senate.gov/legislative/common/briefing/Enactment_law.htm.

[13] The resulting bill, H.R. 6, absorbed H.R. 3130 and S. 1513. Two minor changes were made to the language initially proposed by the De-

language that remains in effect today and, as noted, includes the language that is at issue in this case. Since 1994, Congress has revisited and reauthorized the Impact Aid Program without making any changes to the relevant language. Thus, the statutory language at issue is that language that the Department of Education requested that the Congress enact.

Specifically, the statutory equalization or disparity test provides as follows:

> [a] program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent.

20 U.S.C. § 7709(b)(2)(A). As requested by the Department, the statute includes a general parameter further requiring the Secretary, when making the disparity determination under the above provision, to:

> disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State.

20 U.S.C. § 7709(b)(2)(B)(i). The statute provides no further specifics addressing how the Secretary is to apply the disparity test.

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partment. First, the phrase "fiscal year preceding the FY for which the determination is made" was added in section (b)(2)(A) to clarify the meaning of "second preceding fiscal year." Second, the final law includes "or below the 5th percentile" in section (b)(2)(B)(1). All of the language at issue here was requested of Congress by the Department of Education.

Following the 1994 reauthorization, the Department of Education amended the relevant regulations to address the new language of the statute, *i.e.*, the language it had proposed to Congress. Because the statute specified the use of the disparity test and eliminated the other two options for achieving equalization, the regulations had to be amended to eliminate those options. *See* 60 Fed. Reg. 50,774, 50,797-00 (Sept. 29, 1995) (later published at 34 C.F.R. § 222.162(a); 34 C.F.R. pt. 222, subpt. K, app. (1996)).[14] With respect to the remaining option for determining equalization, the disparity test, the Department drafted 34 C.F.R. § 222.162(a) to directly mirror the statutory language:

> The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.

34 C.F.R. § 222.162(a) (1996). These changes simplified the predecessor regulations. *Compare with* 34 C.F.R. §§ 222.62-222.65 (1993). The new language maintained the predecessor regulations' reference to the subpart's appendix for the specific method for calculating the percentage of disparity. The appendix referenced by the regulation (the "Subpart K Appendix") set forth a precise methodology for conducting the disparity test. It retained the methodology for implement-

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[14] The rulemaking notice states that "the Secretary in this final regulation has removed regulations that are obsolete due to changes made in the statute by the Improving America's Schools Act of 1994 (IASA), or that are unnecessary due to the fact that they simply repeated statutory provisions." 60 Fed. Reg. 50,774 (Sept. 29, 1995).

ing the 95th and 5th percentile exclusions that had been set forth in the appendix to the predecessor regulations.

In accordance with the Subpart K Appendix, the Secretary takes the following steps in applying the disparity test:

> (1) Rank all LEAs on the basis of current expenditures or revenues per pupil;
>
> (2) Identify the LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs; and,
>
> (3) Subtract the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in step (2), and divide the difference by the lower figure.

See 34 C.F.R. pt. 222, subpt. K, app. (1996). Under the statute and regulation, if the resulting figure is 25 percent or less, that state's system qualifies as equalized. 20 U.S.C. § 7709(b)(2)(A); 34 C.F.R. § 222.162(a) (1996).

The 1995 regulations accomplished exactly what was intended by the reauthorization of the Impact Aid Program – they established the Department's disparity test as the sole standard for certification, just as "requested" and "proposed" to Congress by the Department, but left the disparity test itself intact.

C. New Mexico's Funding Equalization Process.

The New Mexico School Funding Formula aims to equalize financial opportunity at the highest possible revenue level and to guarantee each New Mexico public school student equal access to programs and services appropriate to his or her educational needs regardless of geographic location or local economic conditions.[15] Under this formula, New

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[15] The New Mexico Public School Finance Act governing the state equalization program is codified at N.M. Stat. Ann. § 22-8-1 *et seq.* (1978).

Mexico guarantees each LEA 100% of its calculated program cost.[16]

In determining program cost, the formula takes into account the variation in costs associated with providing educational services to students with differing needs. For example, research indicates that educating high school students costs more than educating first graders and that additional funding is required for the provision of bilingual education and special education services. To account for these cost differentials, the state calculates program cost using units rather than pupils. For example, a tenth grade student is counted as 1.25 units to account for the higher cost in educating high school students. The district's total number of program units is multiplied by the program unit value to determine the district's program cost.[17]

Next, the State determines the amount for each district's state equalization guarantee ("SEG") allocation by considering each district's program cost in conjunction with portions of certain local and federal revenues received by the district. Specifically, the State subtracts from the program cost a portion (75%) of each (i) school district property tax revenue, (ii) federal forest reserve funds, and (iii) the Impact Aid that the State is permitted to consider. The resulting figure is the district's total SEG, the amount of money allocated by the State to defray the program cost.

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[16] The program cost is the amount of money assumed under the formula to be necessary for a given district with a particular configuration of students and educational programs to provide educational services.

[17] The New Mexico Secretary of Public Education establishes the program unit value by dividing the legislatively appropriated program cost (comprised of the appropriated state equalization guarantee plus the projected credits for Impact Aid, forest reserve, and the .5 mill levy) by the total number of units generated by all school districts for a given fiscal year.

It is noteworthy that the actual revenues available to a school district include certain types of nonrecurring revenues that are not considered when determining each LEA's SEG but are nonetheless included when the disparity test is applied. For example, user fees, insurance recoveries, and nonrecurring federal grants are all included in determining an LEA's per-pupil revenue level for purposes of the disparity test and have the ability to significantly augment the amount of funds available to a school district for a given year. These non-recurring exceptional revenues can lead to districts having very high per-pupil revenue levels despite the state equalization process.

D. Procedural History.

On October 5, 1999, the Assistant Secretary for Elementary and Secondary Education conducted the analysis required under the statute and its implementing regulations and certified New Mexico as an equalized state under section 8009(b) of the Impact Aid law for FY 2000.[18] Accordingly, New Mexico was authorized to consider a portion of the federal Impact Aid funds received by its LEAs when determining state aid allocations for LEAs and making those disbursements for free public education for FY 2000. See 20 U.S.C. § 7709(b)(1).

The Department's certification of New Mexico's equalization program has undergone numerous reviews, each review concluding that the Department's certification of the State's voluntary equalization program met the requirements of federal law.[19] Both the administrative law judge (the "ALJ")

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[18] Section 8009(b) of the Impact Aid law is codified at 20 U.S.C. § 7709.

[19] Petitioners mistakenly state on page four of their brief that an annual certification hearing was conducted for fiscal year 2000. In fact, no certification hearing was held that year since no LEA acted on its right to request a hearing. As stipulated to by the parties in this case, only

assigned to hear the case and the Secretary concluded that New Mexico's program complied with the statutory requirements and that the Department correctly certified New Mexico as an equalized state under 20 U.S.C. § 7709(b). *Zuni Public School District No. 89*, Dkt. No. 99-81-I (Dep't Education Initial Decision April 17, 2001), 2001 WL 34402493 (ED.O.H.A.) (Pet. App. at 43a-58a.); *Zuni Public School District No. 89*, Dkt. No. 99-81-I (October 11, 2001), 2001 WL 34798131 (EDDS) (Pet. App. at 34a-40a).

On appeal from the ALJ decision, the Secretary specifically addressed petitioners' allegation that the regulation at 34 C.F.R. § 222.162(a), including the appendix thereto, failed to properly implement the disparity test set forth at 20 U.S.C. § 7709(b). The Secretary concluded that because the statute is ambiguous and because the regulations are consistent with the statute, the Department's regulatory scheme for determining disparity under 20 U.S.C. § 7709(b) is a reasonable and permissive implementation of the statute and must be upheld. (Pet. App. at 37a-40a.) Regarding the Department's promulgation of a specific methodology for calculating a state's disparity, as set forth in the Subpart K Appendix, the Secretary determined that "[t]here is nothing within the text of the statute that precludes this interpretation or requires another result." (Pet. App. at 39a.)

On Petition for Review, a Tenth Circuit panel also considered and upheld the Department's certification of the State's equalization program. *Zuni Pub. Sch. Dist. No. 89* v. *U.S. Dep't of Educ.*, 393 F.3d 1158 (10th Cir. 2004) (Pet. App. at 3a-33a.). After a thorough analysis of the statutory and regulatory scheme, the Tenth Circuit panel also found the

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"Bloomfield Schools requested a hearing but subsequently withdrew its request. As a consequence, no predetermination hearing was held since no other LEA requested a predetermination hearing. The determination was based on the State's data submission." (Pet. App. at 202a.)

statute ambiguous, and concluded that the Department's construction of 20 U.S.C. § 7709(b)(2), through its application of the disparity calculation methodology laid out in the regulation, is permissible. *Id.* at 1168. (Pet. App. at 18a-19a.) One judge dissented from the panel's majority opinion because, in his view, the statutory language at issue is unambiguous. See *Id.* at 1170 (O'Brien dissenting) (Pet. App. at 23a-24a.).

The Tenth Circuit Court of Appeals granted Petitioners' Motion for Rehearing En Banc.[20] Subsequently, the en banc Tenth Circuit divided evenly, and the decision of the agency was affirmed by the equally divided court of appeals. *Zuni Pub. Sch. Dist. No. 89 v.U.S. Dep't of Educ.*, 437 F.3d 1289 (10th Cir. 2006) (en banc) (Pet. App. 1a-2a.). This Court granted the petition for certiorari to the Tenth Circuit.

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly affirmed the Secretary of Education's decision that New Mexico is an equalized state for purposes of the Impact Aid program. In promulgating these regulations, the Secretary exercised the authority delegated to him by Congress and reasonably interpreted ambiguous statutory text describing a highly technical process for determining whether a state has equalized its school districts' revenues. Because the statute is ambiguous, the Secretary's interpretation must be upheld if it is reasonable under the framework established in *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

The statute at issue in this case, § 7709(b)(2)(B)(i), is ambiguous. In relevant part, it instructs the Secretary that, in performing the disparity calculation, he shall "disregard local

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[20] In accordance with Tenth Circuit Rule 35.6 and as directed by specific order issued by the Tenth Circuit Court of Appeals, the panel opinions were vacated when rehearing *en banc* was granted.

educational agencies with per-pupil expenditures or revenues above the 95th percentile of such expenditures or revenues in the State." The statute does not, however, specify a methodology for doing so, and there are at least two alternatives.

Specifically, a percentile is a value in a data set; thus, in order to determine a percentile, one must first identify the relevant data set. Section 7709 identifies the relevant data set as per-pupil revenues in the State, and it is this phrase which is ambiguous. In petitioners' view, the only possible data set defined by this phrase is a list of the amounts of each LEA's average per-pupil expenditure or revenue level (a list of roughly 90 data points in New Mexico). This is wrong. Each pupil in the State may be deemed to have his or her own per-pupil revenue. Thus, the text may reasonably be interpreted to identify a data set composed of all of the per-pupil revenues in the state – a data set with a data point for each pupil in a state. Under that reading, the revenue numbers that lie at the 95th and 5th percentiles of the data set composed of all individual pupils' per-pupil revenue numbers are identified, and then, only after this identification, the LEAs that have per-pupil revenues above and below those numbers, respectively, are excluded. This is exactly the result the Secretary's regulations achieve.

The ambiguity of section 7709 is made even more evident when it is considered in the context of the statute as a whole and in light of its history and purposes. The statutory text had its origin in an administration proposal to eliminate two of the three regulatory tests for determining equalization and to codify the Department's third test – the disparity test – as the sole test. Congress enacted the Administration bill without comment or elaboration, in no way suggesting any disagreement with the Department's long-standing disparity test for determining whether a state is equalizing. Indeed, the legislative record is devoid of any expression of congressional intent apart from acceptance of the Department's proposal. This

statute thus cannot be read, as petitioners do, to *discard* the established disparity process for determining equalization *sub silentio*, and to impose a dramatically different process – indeed, a process that would produce results that the Department had previously rejected as "unfair and inconsistent." 41 Fed. Reg. at 26,324.

Moreover, petitioners' reading of section 7709 utterly ignores its statutory context. The Impact Aid program considers the *numbers of federally-affected pupils* in school districts in determining how much Impact Aid should be provided. 20 U.S.C. § 7703(a) & (b). The other equalization incentive in Title I of IASA, the Education Finance Incentive program, considers the *numbers of pupils* in school districts in awarding funds, 20 U.S.C. § 6337(b)(3); and expressly incorporates and endorses the Secretary's regulation implementing the disparity test. And, the statute's definition of LEA reflects a federal interest in forbidding states to manipulate the number of school districts to distort the distribution of Impact Aid, 20 U.S.C. § 7713. Section 7709 was thus enacted in a statutory context that reveals a clear congressional intent to support aid and equalization based on the numbers of pupils affected, not based on the number of school districts affected, and an express congressional affirmation of the Secretary's interpretation. On petitioners' reading, however, Congress ordered the Secretary to calculate the amount of Impact Aid for each school district *based on the number of affected pupils*, but also ordered the Secretary to determine whether a state was equalizing expenditures among its LEAs (and thus entitled to consider a school district's Impact Aid in allocating state funds) *without considering the number of pupils*. This makes no sense.

Because the statutory language at issue is ambiguous, and because the regulatory scheme implementing the statute constitutes a reasonable interpretation, indeed the best interpretation, of the language in this context, this Court should affirm

the Tenth Circuit's judgment affirming the Secretary's interpretation of § 7709(b)(2)(B) and certifying New Mexico as a state "equalizing expenditures."

ARGUMENT

THIS COURT SHOULD AFFIRM THE SECRETARY'S DECISION.

Where the decision of a federal agency is at issue and involves the agency's interpretation of federal statutes, as in the case at bar, the Court's review is guided by the principles established in *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), and its progeny. Under *Chevron*, courts conduct a two-step analysis: determining (i) whether the statute unambiguously resolves the interpretative question and (ii) if not, whether the agency's interpretation is a permissible and reasonable one.

"Statutory construction is a 'holistic endeavor.'" *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004). Thus, in conducting the first step of this analysis, this Court examines not only "the language itself," but also "the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997).

The precise question in this case is the meaning of language that explains when a state may be deemed to have "equalize[d] expenditures for free public education among [school districts]" as a matter of federal law. 20 U.S.C. § 7709(b)(1) (2000 & Supp. III 2003). As we now show, the statutory language that describes the process for determining whether a state has equalized expenditures is ambiguous, and the Department of Education's interpretation of that text is a reasonable and thus permissible reading of highly technical statutory language. It is, indeed, the only reading of the language that is consistent with the statutory history and context and with congressional intent.

I. THE STATUTE AT ISSUE IS AMBIGUOUS.

A. The Text By Itself Is Ambiguous.

The statute at issue in this case, 20 U.S.C. § 7709, states that in making the determination whether a state is equalized, the Secretary shall "disregard [LEAs] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." *Id.* § 7709(b)(2)(B)(i). This language fails to provide a clear methodology for the disparity test and is clearly open to multiple interpretations. Indeed, when considered in the context of the history of its enactment and amendment and of the other provisions of the Impact Aid program and Title I, section 7709 cannot be read as petitioners urge.

Initially, section 7709 does not address or prescribe a precise methodology for use in conducting the disparity test. The statute allows states to exclude LEAs above the 95th percentile or below the 5th percentile of per-pupil revenues when determining disparity, but does not provide the Department with precise directions for determining what the 95th and 5th percentiles of "such per-pupil revenues in a State" are. The statute makes clear that some LEAs are to be disregarded before performing the disparity test, and it is also clear that the 95th and 5th percentiles of per-pupil revenues must be identified. The statutory language is unclear, however, about the meaning of the phrase "per-pupil expenditures or revenues above the 95th or 5th percentile of those expenditures or revenues in the State"; and this phrase is open to multiple interpretations. As the Secretary noted:

> Although the impact aid statute sets forth the parameters for calculating state public education expenditures or revenues under the disparity test, the statute does not contain a specific implementation of the disparity test; instead, Congress left that gap to be filled by regulations, which has been duly promulgated at an appendix to Subpart K of 34 C.F.R. Part 222.

Zuni Public School District No. 89, Dkt. No. 99-81-I (Oct. 11, 2001), 2001 WL 34798131. (Pet. App. at 37a.) Because the statute merely provides parameters for determining disparity, the Secretary was free to establish the precise methodology to be applied so long as his choice was not "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) (citing *Chevron*, 467 U.S. at 844). It is the Secretary who is in the best position to assess the implications of the statutory language, to determine whether that language is susceptible to multiple interpretations, and to settle upon a reasonable interpretation to implement the statute.

Like the Secretary, the Court of Appeals panel agreed with the Secretary and found the statute ambiguous:

> We agree with the Secretary's determination that the statute is ambiguous . . . we do not know what calculations Congress intended by 'such [per pupil] expenditures in the State.' Even Zuni conceded in its argument before the ALJ that the statute 'may be ambiguous [as] to the precise formula that is to be used.' *Id.*, doc. 16 at 10. The statute's ambiguity, coupled with the gap left by Congress regarding the specific means by which to implement the disparity test, requires us, in accordance with the well-established rule laid out in *Chevron*, to give deference to the Secretary's interpretation of the statute if we deem that interpretation to be reasonable or [permissible].

Zuni, 393 F.3d at 1166-1167. (Pet. App. at 16a-17a.)[21]

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[21] Further support for the conclusion that the statutory text is ambiguous lies in the multiple interpretations of the statute (at least four) that have been suggested in the course of the proceedings of this case. From the inception of this case, even petitioners, have recognized that there are multiple possible interpretations of the statutory text. (*See e.g.*, Pet. En Banc Reply Br. at 4.) Initially, petitioners proffered two different ap-

Petitioners concede that the Secretary's methodology would be a reasonable approach if reconcilable with the language of the statute. The single burden of their brief is a contention – inconsistent with their position below, *See* n.21, *supra* – that section 7709 has only one possible interpretation. Specifically, petitioners adopt Judge O'Brien's reading which focuses instead on the meaning of "percentile" (a word neither the Department nor New Mexico contends is ambiguous), and ignores the phrase "such per-pupil revenues in the state," a phrase which has at least two possible interpretations relevant here.

Because petitioners' brief and Judge O'Brien's dissent address only the meaning of the word "percentile," both read the statute to require that Department determine the single figure representing the amount that each LEA spends on the average on each pupil, and then rank LEAs based on their average expenditure levels. Both fail to consider the meaning of the phrase "such per-pupil revenues in the state," and to recognize that it may not mean the *single* amount an LEA spends on the average on each pupil, but instead may refer to

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proaches for making the disparity calculation: (i) eliminate 5% of the LEAs that are at either end of the spectrum, regardless of how many pupils are served by those LEAs; or (ii) calculate 95% of the per-pupil expenditures or revenues for the LEA with the highest per-pupil expenditures or revenues and eliminate any LEA whose per-pupil expenditures or revenues is above that amount, and implement a corresponding exclusion of LEAs at the low end of the spectrum. (*See* Pet. App. at 15a.) Before the Tenth Circuit panel, petitioners argued that section 7709(b)(2)(B)(i) would permit the Secretary to adopt either of two different approaches, neither of which the statute specifically identifies. In his dissenting opinion, which petitioners now rely upon, Judge O'Brien developed a fourth methodology that differed from the Secretary's methodology and from the two alternative methodologies proffered by petitioners. *See Zuni*, 393 F.3d at 1170-1172 (O'Brien, dissenting) (Pet. App. at 24a). The parties' long-term recognition that a variety of methods could be utilized to conduct the disparity test is significant evidence that the statutory text is susceptible to multiple, reasonable interpretations.

all "per-pupil revenues" for which each LEA is responsible. That is, every student in New Mexico has a "per-pupil revenue," and the list of all of those individual student numbers constitutes "such per-pupil revenues in the State."

On this view, the statute may be read to require the Secretary to list the per-pupil expenditure for *all pupils* in the state, to find the 95th and 5th percentile of that list, and to disregard the LEAs whose per-pupil revenues are above and below those percentiles. This is the functional equivalent of disregarding LEAs with the five percent of students who receive the highest per-pupil spending and the five percent of students who receive the lowest per-pupil spending. The Secretary's methodology – which frames its inquiry in terms of student population – thus considers the entire universe of per-pupil expenditures for the state. This is a legitimate alternative reading of the phrase "such expenditures or revenues in the state."

More specifically, a percentile is a value in a data set; thus, in order to determine a percentile, one must first identify the relevant data set. In petitioners' view, the only possible data set identified by the statute is the list of the amounts of each LEA's average per-pupil expenditure or revenue level. Accordingly, only those LEAs with average per-pupil expenditure or revenue levels above the 95th and below the 5th percentile in the data set consisting of the amount of each LEA's average per-pupil expenditure level would be excluded before the Secretary determines whether the state is equalizing expenditures. This is not, however, the only possible data set identified by the statute. The text may reasonably be interpreted to identify a data set composed of all of the per-pupil revenues in the state – a data set that would correspond in size to the state's student population because every student in the state has a corresponding per-pupil revenue. Under that approach, the revenue or expenditure numbers that lie at the 95th and 5th percentiles of the

data set composed of all individual pupils' per-pupil expenditure numbers are identified, and then, only after this identification, the LEAs that have per-pupil expenditures or revenues above those numbers are excluded.

The text at issue is ambiguous even when read in isolation. And, as we now show, the statutory context in which section 7709 is embedded strongly supports the Secretary's reading of the statute and weighs heavily against petitioners' reading of the text.

B. The Statutory Scheme As A Whole Supports The Secretary's Interpretation.

As this Court has explained, a statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) (citations omitted). The statutory scheme at issue has several aspects that demonstrate that Congress was concerned about both allocating Impact Aid and encouraging state equalization efforts as measured by the numbers of pupils affected, and not based on the numbers of school districts affected.

First, Impact Aid is allocated under a method that expressly considers pupil population in determining how much aid a federally-affected district should receive. *See* 20 U.S.C. § 7703(a). Specifically, the statute requires a determination of how many federally-affected pupils are served by a particular school district, and then conducts a calculation that assigns a weighted value to students based on the degree and type of federal effect at issue. *Id.* This results in a "total number of weighted student units" for each LEA and determines the "basic support payment." *Id.* § 7703(a)(2). School districts, in other words, are not treated as fungible, equal

units. They are treated differently based on the numbers of federally-affected students that they serve. Impact Aid is allocated as a function of the number of federally-affect students, not based on the number of LEAs affected.

In this setting, it makes little sense to allocate Impact Aid based on pupil numbers, but to determine whether a state has equalized spending (and thus is entitled to consider Impact Aid in making state funding allocations) without considering pupil numbers at all. If a school district receives Impact Aid based on how many pupils it serves, a determination whether a state is equalizing funding, and thus can consider that Aid in allocating funds among school districts, necessarily should be based on the state's success in equalizing funding considering all pupils. Yet on petitioners' reading of the statute, the number of pupils in each LEA is irrelevant to the equalization determination. This is simply an absurd way to determine equalization which is focused on equitable treatment for pupils, not school districts which are simply a vehicle for conveying benefits to pupils.

Additional support for the federal definition and goals of equalization is found in other provisions of the relevant statutory context. In the only other provision of Title I of IASA addressing equalization, 20 U.S.C. § 6337, the Secretary is instructed to award certain education finance incentive grants to states based on their fiscal efforts in education funding and their efforts to achieve equity. This provision was enacted in 1994, along with the amendment of section 7709 at issue here. In computing the amount of a grant award, the statute instructs the Secretary to weigh variations in school district spending "according to the number of pupils served by the local educational agency." *Id.* § 6337 (b)(3)(A)(ii)(II).

In fact, in awarding education finance incentive grants under section 6337, Congress explicitly adopts the Secretary's interpretation of section 7709 and provides for special considera-

tion of "a State that meets the disparity standard described in section 222.162 of title 34, Code of Federal Regulations (as such was in effect on the day preceding January 8, 2002)." 20 U.S.C. § 6337(b)(3)(B). By citing this regulatory section, Congress directly incorporated and expressly approved the specific methodology of the Appendix to Subpart K, which petitioners here challenge as inconsistent with § 7709. *See* 34 C.F.R. § 222.162. "The method for calculating the percentage of disparity in a State is in the appendix to this subpart." *Id.* Congress' citation and incorporation of section 222.162 into this closely-related statute is a clear congressional affirmation of the Secretary's methodology. In light of this congressional endorsement of the Secretary's reading of the statute, that reading should be affirmed.

Finally, and critically, the nature of the federal interest in equalization, as reflected in these provisions, militates strongly, and perhaps dispositively, against petitioners' interpretation of the statute. Rather than resulting in equalization, petitioners' interpretation can lead to absurd, unfair and inconsistent results, as the Secretary of Education has explained:

> In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in these States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

41 Fed. Reg. at 26,324. Thus, in 1976, the Secretary expressly refused to adopt the interpretation of section 7709 that petitioners now characterize as the statute's sole possible reading, finding that "basing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States." *Id.*

This case reveals that the result feared by the Secretary is not merely a hypothetical concern. New Mexico is a state with a high proportion of small districts, and petitioners' reading of the statute excludes an insignificant fraction of the pupil population, does not exclude anomalous characteristics, and results in a finding that the State does not equalize. This Court has routinely recognized that statutory interpretations that lead to absurd, irrational or counter-productive results are strongly disfavored. *See, e.g., United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) (citing *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978)). Since section 7709 can readily be interpreted to avoid these consequences – consequences expressly identified by the Secretary as unfair and inconsistent – there is no reason to interpret the text to produce such results.

In this statutory context and in light of the federal interests, it makes little sense to interpret section 7709, as petitioners do, to evaluate equalization based solely on variations in LEAs' average revenues without any consideration of the number of students served by each LEA. In contrast, the Secretary's interpretation of section 7709 takes this critical variable into account in calculating disparities and determining equalization. Its reading is the only one that harmonizes the text and the statutory context and purposes.

C. The Chronology Of Section 7709's Enactment Demonstrates That The Secretary's Interpretation Is Correct And That Congress Did Not Alter The Secretary's Disparity Test.

The chronology of events that led to the amendments of the statute at issue here is strong evidence that the statute means what the Secretary says that it means. Specifically, the history of this provision reveals that in 1994, Congress simply adopted the Department's proposed text for 20 U.S.C. § 7709, and therefore that Congress's intent was essentially the De-

partment's intent. There is no indication in the legislative record that Congress was rejecting or disapproving the long-standing disparity test for determining equalization – indeed, that would have been remarkable given that the text was drafted and proposed by the Department itself. Congress simply accepted without change or special consideration the recommendation of the Department in an area of its expertise. Indeed, since 1994 and the Secretary's adoption of his implementing regulations, Congress has *reauthorized* this language, implicitly accepting the Department's interpretation as valid.

The legislative history of section 7709 is sparse, but two facts are both indisputable and clear. The language that became 20 U.S.C. § 7709 was the subject of a specific request to Congress by the Department of Education, and Congress did not amend the Department's proposed text in any way material to the provision at issue in this case.[22] The Department requested that Congress codify one of its three long-standing equalization certification tests and eliminate the other two regulatory options for determining equalization. Congress granted the Department's request and passed the Department's legislation into law.

Succinctly, when Congress promulgated the current statute in 1994, it adopted the Department's position that the disparity test should be the sole standard for determining equalization under 20 U.S.C. § 7709(b). Not only did Congress accept the Department's position, it even adopted the Department's proposed language. Congress's sole intent was to

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[22] Comparing section 7709's language in both the House and Senate versions of the Department's Proposal (which were identical), the sole changes to the Department's requested language were: (1) the phrase "fiscal year preceding the FY for which the determination is made" was added in section 7709(b)(2)(A) to clarify the meaning of "second preceding fiscal year"; and (2) the final law added "or below the 5th percentile" in section 7709 (b)(2)(B)(i).

adopt and implement the proposed bill that constituted the Department's intent.

This Court has routinely considered the fact that a statute is enacted at the request of, and as proposed by, the Executive Branch when interpreting that statute. *See, e.g., Kosak v. United States*, 465 U.S. 848 (1984) (considering report of Special Assistant to the Attorney General who had drafted the FTCA provision at issue); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (considering Department of Justice assessment of Title VII in construing one of its provisions); *United States v. Clark*, 445 U.S. 23 (1980) (considering report of the executive branch's Committee on Federal Staff Retirement Systems in interpreting the Civil Service Retirement Act as amended at the Committee's request). And, where as here, the *drafter's* bill itself is enacted into law, its interpretation of that law is entitled to even greater weight. *See also, e.g., BankAmerica Corp. v. United States*, 462 U.S. 122 (1983) (considering testimony of Louis Brandeis, adviser to President Wilson and drafter of proposed legislation); *United States v. Vogel Fertilizer Co.* , 455 U.S. 16 (1982) (giving "great weight" to Treasury Department views because of its role in drafting and explaining statute); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (considering views of executive branch drafter Tommy Corcoran); *Labor Board v. Servette*, 377 U.S. 46 (1964) (considering Administration bill that became relevant provision of the NLRA); *NLRB v. Iron Workers*, 434 U.S. 335 (1978) (same).

New Mexico submits that in light of the chronology of events that led to the enactment of the text at issue, and specifically the enactment of a law drafted by the Department, the inference that the text bears the meaning attributed to it by the Department is inescapable. In addition, this chronology makes absolutely plain that petitioners' argument – that the 1994 amendments constitute a sea-change or dramatic

rejection of the Department's disparity test for determining equalization – is flatly wrong.

Finally, New Mexico fully recognizes that legislative silence is a tool of statutory interpretation that must be used cautiously. Nonetheless, it is noteworthy that on petitioners' view of the statute, Congress made a dramatic change in the Impact Aid program, rejecting the long-established disparity test of the Department and enacting an entirely new test without ever clearly stating that it was doing so.

State equalization of funding is a complex matter that involves consideration of many independent factors. The component of state equalization at issue in this case sits within a myriad of complex, highly technical regulations related to the administration of the federal Impact Aid program. Had Congress intended the radical change supported by petitioners, "some express statement of that intention would surely have appeared" somewhere in the amendments themselves or in the record of events surrounding the enactment. *Zahn v. International Paper*, 414 U.S. 291, 302 (1973). None did. An exhaustive review of the legislative history of the 1994 amendments reveals no such discussion. This history belies petitioners' claim that Congress intended to "reject[ed] the Secretary's 1976 equalization formula." (*See* Pet. Br. at 24.)

Equally to the point, on petitioners' reading of the statute, Congress *sub silentio* discarded long-standing practice *and* adopted an interpretation of the statute that the Secretary had expressly *rejected*. Specifically, in 1974, in promulgating proposed regulations to implement the Impact Aid program, the Commissioner of Education was asked whether the number of pupils or the number of school districts should be considered when determining the 95th and 5th percentile exclusions. After considering the methodology to be used, the Commissioner responded that the percentiles should be determined on the basis of numbers of pupils and not on the

basis of numbers of districts. As noted *supra*, the Commissioner reasoned that:

> [B]asing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

See 41 Fed. Reg. at 26,323-24 (emphasis added).

Thus, petitioners ask this Court to believe that the Department of Education proposed, and Congress without explanation adopted, a statute that determined equalization under a method that the Secretary of Education had rejected as unfair and inconsistent. This simply is not plausible on the undisputed facts that led to the enactment of this law.

Finally, despite recent reauthorizations of the Impact Aid Program and thus opportunities to amend the statute or express concern about the Department's implementation, Congress has expressed no concern about the regulatory administration of 20 U.S.C. § 7709(b). For example, in October 2000, Congress reauthorized the overall Impact Aid statute without altering or commenting on the disparity standard whatsoever. *See* Impact Aid Reauthorization Act of 2000, Pub. L. No. 106-398, 114 Stat. 1654A-368 (2000). Most recently, the 107th Congress amended the Impact Aid law as part of the No Child Left Behind Act, Pub.L. No. 107-110, 115 Stat. 1425 (Jan. 8, 2002). Once again, no changes were made in the statutory provisions at issue in this case. When Congress "re-enacts a statute without change," it is "is pre-

sumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation." *Cf., e.g., Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978) (citing numerous cases). None of these points by themselves would disprove petitioners' reading, but in combination, they clearly demonstrate that the proposed reading is wrong.

Together, the origin of the statutory text, its enactment as proposed by the Department, and Congress's silence concerning the Department's implementation of the Impact Aid program strongly support the Secretary's interpretation and, indeed, suggest that it most accurately embodies Congress's intent. In light of this chronology, the Secretary's interpretation of section 7709 is plainly reasonable.

II. BECAUSE THE SECRETARY'S REGULATION REASONABLY INTERPRETS § 7709, THAT READING IS ENTITLED TO DEFERENCE.

As petitioners appear to recognize, once it is acknowledged that the statutory text is susceptible of more than one interpretation, the only remaining question is whether the Secretary's interpretation falls within the range of "permissible" meanings under *Chevron*, 467 U.S. at 842-43.

Courts award a significant degree of deference to administrative agencies in applying the second prong of the *Chevron* test. In cases, such as this one, where the relevant statute is "ambiguous", courts are generally required to defer to the agency's interpretation if it is "based on a permissible construction of the statute." *Id.* at 843. The agency's construction need only be "rational and consistent with the statute." *See NLRB* v. *United Food and Commercial Workers*, 484 U.S. 112, 123 (1987). An agency's interpretation of a statute must be upheld "unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Mead*, 533 U.S. at 227. It is "axiomatic that the [agency's] interpretation of [the statute] for which it has

primary enforcement responsibility need not be the best one by grammatical or any other standards. Rather the [agency's] interpretation of ambiguous language need only be reasonable to be entitled to deference." *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 115 (1988). "[D]eference is particularly appropriate on this type of technical issue of agency procedure." *Id.* at 125 (O'Connor, J., concurring).

Because the regulations at issue, including the Subpart K Appendix, are reasonable and permissible interpretations of the statute, the regulations at issue are entitled to deference under the *Chevron* test and should be upheld.

As set forth *supra* at 25, a per-pupil expenditure or revenue is an average number. It is not the amount actually spent on any given pupil, an amount which would be impossible to calculate in any meaningful way. It is roughly the total amount expended by an LEA divided by the number of pupils in that LEA. Each and every student in an LEA and in a state may be treated as having his or her own "per-pupil" expenditure or revenue amount. The statute reasonably permits the Secretary's methodology which: (i) assigns a per-pupil expenditure or revenue number to every student in every school district in the state, (ii) identifies the per-pupil expenditure or revenue value at the 95th and 5th percentiles of that data set – to wit, the list of all students each with his or her assigned expenditure or revenue amount; and then, and only then, (iii) identify and disregard the LEAs that include the pupils above the 95th and below the 5th percentile of those identified per-pupil expenditure and revenue values.[23]

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[23] The statutory phrase "with per-pupil expenditures or revenues above . . . or below" describes which LEAs must be disregarded in completing the disparity determination. Therefore, in order to determine which LEAs will be disregarded, a mandatory prerequisite is a determination of the number that constitutes the State's per-pupil expenditures or revenues at the 95th and 5th percentiles of the data set.

In New Mexico, during the time at issue, there were approximately 317,777 pupils in the state and thus there were 317,777 per-pupil revenues in the state. The statute directs the Secretary to determine the 95th and 5th percentile marks of that data set of 317,777 per-pupil expenditures, and then to exclude all LEAs with students above the 95th and below the 5th percentile. The disparity calculation thus ignores those LEAs whose pupils are outside of these percentile marks. Again this is a two step process, first identifying the location of the relevant percentiles within the ranking of all per-pupil revenues, and then identifying and eliminating the LEAs that fall at that point.

The critical difference between the two approaches lies in the parties' different interpretations of the statutory language "per-pupil expenditures and revenues." Petitioners interpret this phrase to mean the single value amount that represents what each LEA spends on the average on each pupil, and thus finds the 95th and 5th percentile of a data set that is a list of LEAs ranked in order of average revenues and expenditures.[24] But, the phrase may be interpreted to mean a list of all students with their corresponding per-pupil revenue amounts. (Indeed, the statute does refer to per-pupil revenues and expenditures in the plural.) The Secretary's process ultimately considers the entire universe of per-pupil expenditures for the state. Inasmuch as each per-pupil revenue is represented by one student, this process ranks all of the per-pupil expenditures or revenues and then eliminates the LEAs

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[24] Insofar as petitioners attack the Secretary's method for looking to percentiles of numbers of students, the petitioners' method can be attacked for looking to percentiles of number of LEAs. Technically, both approaches might be less than linguistically perfect because the statute requires looking to percentiles of per pupil revenues. Understanding the meaning of percentile and that it corresponds to a data set, the main difference, again, is which data set can be used. The statute does not preclude either option.

which, aggregately, have up to 5% of the per-pupil expenditures or revenues in the state at both the top and the bottom of the ranking. Thus, the LEAs that represent the 5% of the per-pupil revenues at each extreme are excluded for purposes of the disparity determination, as directed by the statute.[25] Put differently, petitioners assert that the only possible interpretation of the statute requires the state to focus on the singular amount that each LEA expends on pupils on average, even though the statute refers not to each LEA's average spending but to all "such expenditures or revenues in the State."[26]

The Secretary considers the full range of "such expenditures or revenues in the state" by including the per-pupil revenue amounts that correspond to every student ("per-pupil") in the state – not just the amount of the average per-pupil revenue level for each LEA in the state. The appendix language could have referred to the "per-pupil revenues" instead of population. However, the process used is correct because a "pupil" (the ranking measurer, or data set, named in the appendix) – always corresponds to a "per-pupil revenue" (the ranked values named by the statute). Thus the flaw, if

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[25] Petitioners' interpretation of the statute is the same as that of Judge O'Brien in the dissenting opinion below. He too would limit the data set to the number of LEAs statewide, while the alternative interpretation of the statute considers the full data set of per-pupil expenditures or revenues statewide, a number of values based upon student population.

[26] Petitioners imply that the number of per-pupil expenditures or revenues statewide must be limited to the number of LEAs within a state. This is incorrect. For each pupil attending school in any LEA in a state, there is a corresponding per-pupil expenditure or revenue. In order to comply with the statutory requirement that all "per-pupil revenues or expenditures…in the state" be considered, the Secretary must consider the full data set of "such revenues and expenditures," a set that would be equal in number to student population. For example, in New Mexico, for FY 2000, the number of per-pupil revenue values in petitioners' data set would be 89, while under the alternative interpretation of the text, the data set would consist of 317,777 values.

any, is imprecision of language but not of process or result. Accordingly, application of the Secretary's process achieves the same results as the application of the state's statutory interpretation set forth above. Thus, the Secretary's interpretation of the statute is a permissible one under *Chevron*.

Even accepting Judge O'Brien's position that an EXCEL formula is the final authority on how to calculate a percentile, the EXCEL formula for determining the 95th and 5th percentiles can be applied to either petitioners' proposed data set or to the data set composed of all pupils' per-pupil revenues.[27] Applying the EXCEL formula to the full data set (as opposed to the data set advocated by petitioners), the end result is identical to the results reached by the Secretary's formula.[28]

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[27] Judge O'Brien simply cited EXCEL's percentile function without any explanation of what that function actually does. To shed light on this method, the EXCEL percentile formula is an algorithm. Once the data set is selected, you must find the kth smallest member in the array of values, where:

k = [(percentile/100) * (n – 1)] + 1

n = number of values in the array

percentile = the value between 0 and 100 depending on which percentile you want to find

If the result is such that k is not an integer, truncate the result and store the fractional portion (f) for use later in the algorithm. The final step of the algorithm will be to interpolate between the kth and the (k+1)th smallest values:

OUTPUT = a[k] + (f * (a[k + 1] – a[k])

Where: a[k] = the kth smallest value

a[k + 1] = the (k + 1)th smallest value

The output figure is the resulting value at the selected percentile.

[28] Applying the EXCEL percentile algorithm Judge O'Brien applied to the limited per-pupil revenue data set to the full per-pupil revenue statewide data set:

n = 317,777 percentile = 95, 5

Clearly, the regulations, in accordance with the statute, require the Secretary to "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2)(B); 34 C.F.R. § 222.162(a). The Secretary's interpretation excludes such LEAs and is thus undoubtedly "rational and consistent with

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Then, at the 95th and 5th percentiles:

$k = [(95/100) * (317{,}777 - 1)] + 1 = 301{,}888.2$

$k = [(5/100) * (317{,}777 - 1)] + 1 = 15{,}889.8$

$k = 301{,}888$	$k = 15{,}889$
$k + 1 = 301{,}889$	$k + 1 = 15{,}890$
$f = 0.2$	$f = 0.8$

Again, this data set includes all per-pupil revenues statewide, such that every per-pupil revenue in the data set corresponds to a student. The students are ranked by their per-pupil revenue, which varies by the LEA they attend. The next step requires considering the value corresponding to the kth and [k + 1]th data points. In other words, we must consider the kth and [k + 1]th ranked students' corresponding per-pupil revenues. Those values are:

$a[k] = \$3{,}259$	$a[k] = \$2{,}848$
$a[k + 1] = \$3{,}259$	$a[k + 1] = \$2{,}848$

Applying the final step of the algorithm:

$OUTPUT = 3259 + [0.4 * (3259 - 3259)] = 3259$

$OUTPUT = 2848 + [0.8 * (2848 - 2848)] = 2848$

Accordingly, the 95th and 5th percentiles of per-pupil revenues, respectively, fall at $3,259 and $2,848. Having determined the 95th and 5th percentiles of per-pupil revenues statewide, we must then identify the LEAs in each ranking that fall at those percentiles (i.e., the LEAs with per-pupil revenues of $3259 and $2829). Doing so, we identify Peñasco (95th percentile) and Hobbs (5th percentile) respectively. As such, LEAs ranked above Peñasco and below Hobbs - the same results reached under the Secretary's methodology (*See* Pet. App. at 210a-213a) - are disregarded under section 7709(b)(2)(B) before the Secretary applies the 25% disparity test.

the statute," *United Food and Commercial Workers*, 484 U.S. at 123, and "based on a permissible construction of the statute," *Chevron*, 467 U.S. at 843. As such, the regulations are reasonable and the Secretary's decision should be affirmed.

III. THE SECRETARY'S INTERPRETATION OF THE STATUTE, SET FORTH IN HIS REGULATION AND IN THE ADJUDICATION IN THIS CASE IS ENTITLED TO DEFERENCE UNDER *CHEVRON*.

The core of petitioners' argument is that the Secretary's methodology is inconsistent with the statute and fails at step one under *Chevron* analysis. Alternatively and erroneously, however, petitioners assert that the regulation is not lawful or, at the very least, that the regulation should not be considered under the *Chevron* framework. (*See* Pet. Br. at 37.) Petitioners reach these erroneous conclusions based on two equally faulty premises: (1) that the Secretary lacked the "authority" to promulgate regulations implementing 20 U.S.C. § 7709; and, (2) that the regulation lacks the force of law because it was promulgated without public notice and opportunity to comment as provided by formal rule making procedures. Each premise is wrong.

First, petitioners' principal argument that the Secretary lacked authority to promulgate the regulation at issue is that the statutory text forecloses this regulatory choice. This is simply another version of the argument that the statute has only a single meaning, an argument refuted *supra* at 22-26. In any event, Congress plainly delegated to the Secretary authority to issue regulations specifying the process by which a State may be certified as equalizing expenditures. As a general matter, 20 U.S.C. § 3474 expressly authorizes the Secretary "to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Depart-

ment." More specifically, the statutory provisions at issue in this case expressly call for the Secretary to "mak[e] a determination" and "certif[y]" whether a State equalizes expenditures. 20 U.S.C. § 7709(b)(1) & (b)(2)(B) & (c)(3)(4). In combination, these provisions reflect Congress's decision that the Secretary, as the expert administrator of the Impact Aid program, should have authority to issue regulations implementing that program.

Second, the regulation at issue was exempt from the Administrative Procedures Act's general public notice-and-comment requirements. While notice of proposed rule making is generally required, an exception exists:

> [W]hen the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b) & (b)(B). The Secretary expressly relied on this exception in waiving formal rulemaking. As clearly stated along with the announcement of the final regulations at issue in this case:

> [T]hese regulations merely reflect statutory changes, remove unnecessary and obsolete regulatory provisions, reorganize and clarify the language of the regulations, and make minor procedural revisions. Thus, the regulations do not establish or affect substantive policy. Therefore, the Secretary has determined with respect to amendments made due to statutory changes that, pursuant to 5 U.S.C. 553(b)(B), publication of a proposed rule is unnecessary and contrary to the public interest, and with respect to the procedural changes that, pursuant to 5 U.S.C. 553(b)(A), public comment is not required.

60 Fed. Reg. 50,773, 50,778 (Sept. 29, 1995).

The Secretary had "good cause" to make this determination. As explained *supra*, the regulation at issue was simply a

clarification of a prior regulation that had been promulgated pursuant to formal rulemaking procedures. In these circumstances, the Secretary reasonably decided that a second round of formal rulemaking was unnecessary. Indeed, because Congress had enacted the precise statutory language proposed by the Secretary, the Secretary reasonably understood the new statutory language to be an affirmation response to the Department's request that Congress eliminate two of the three equalization tests and codify the Department's then 18-year implementation of the disparity test. *See supra* at 9-15, 29-33. Thus, the Secretary amended the regulations at issue to "remove unnecessary and obsolete regulatory provisions" including references to the previous equalization options. 60 Fed. Reg. at 50,778. In doing so, the Secretary correctly concluded that this did not establish or affect substantive policy and that notice and public commenting were unnecessary in accordance with 5 U.S.C. § 553(b)(B). In light of the prior formal notice and comment process on the regulation and the history of enactment of the statutory provision at issue, the Secretary's interpretation of the regulation implementing the statute is entitled to *Chevron* deference.

A federal agency's interpretation of the statute that it administers is entitled to *Chevron* deference when that interpretation is promulgated as part of a formal rulemaking, but agencies are also entitled to deference when they announce a statutory interpretation in the course of an adjudication. Indeed, this Court recently stated that "deference under *Chevron* . . . does not necessarily require an agency's exercise of express notice-and-comment-rulemaking power." *Edelman v. Lynchburg College*, 535 U.S. 106, 114 (2002). An agency can also express its reading of a statute through the formal adjudication of a complaint and, when it does so, that reading is entitled to *Chevron* deference. *See Mead Corp.*, 533 U.S. at 230-31 & n.12. *See also INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (adjudication on decision to withhold deportation).

Relevant here, after the Secretary certified New Mexico as equalized in 1999, petitioners exercised their right under the Impact Aid statute to contest the Secretary's determination. *See* 20 U.S.C. § 7711(a). As both the statute and the regulation required, an ALJ conducted an administrative hearing at which all parties appeared, were represented by counsel, and were provided with a full opportunity to present their views. *See* 20 U.S.C. § 7711(a); 34 C.F.R. § 222.165 *et seq*. The ALJ issued an initial decision concluding that New Mexico's program complied with the statutory requirements and that the Department had correctly certified New Mexico as an equalized state under 20 U.S.C. § 7709(b). *See* Pet. App. at 43a-58a. On appeal and after careful review of the ALJ decision, the Secretary affirmed stating, "[T]hose regulations [Appendix of Subpart K] are consistent with the statutory provision they implement." Pet. App. at 40a.

The Secretary's order determining New Mexico was properly certified under section 7709 was a formal adjudication. *See* 5. U.S.C. § 551 (defining "adjudication"); *id.* § 554 (listing the guidelines for an "adjudication"). In the course of that adjudication, the Secretary announced his interpretation of the relevant statutory provisions. This Court has held that where, as here, an agency is charged with the authority to administer and enforce a statute, and the statute dictates that the agency's determinations "shall be controlling," the agency's reading of the statute it administers in the course of an adjudication is entitled to *Chevron* deference. *See Aguirre-Aguirre*, 526 U.S. at 425 ("Based on this allocation of authority, we recognized . . . that the [Bureau of Immigration Appeals] should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'"). *See also Christensen v. Harris County*, 529 U.S. 576 (2000) (Scalia, concurring in part and concurring in judgment).

The Secretary is vested, by law, with the authority to hear challenges to an equalization certification, and the statute renders the Secretary's findings conclusive, if supported by substantial evidence. *See* 20 U.S.C. § 7711(a) & (b)(2). The Secretary announced his reading of the statute in his adjudication of New Mexico's status as equalized. Thus, the Secretary's determination that the Subpart K Appendix is consistent with the Impact Aid statute is entitled to *Chevron* deference.

For each of these reasons, petitioners' claim that the Secretary's reading of the statute is not entitled to *Chevron* deference is meritless.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit Court of Appeals upholding the Secretary's decision should be affirmed.

Respectfully submitted,

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